(4)

No. 84-1176

IN THE

Supreme Court of the United States

October Term, 1984

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Appellant,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, OCCIDENTAL CHEMICAL CORPORATION, and THE BROOKLYN UNION GAS COMPANY,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION TO DISMISS APPEAL OR AFFIRM JUDGMENT BELOW

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TABLE OF CONTENTS.

	Page
Table of Authorities	i
Statement of the Case	2
A. PURPA §210	2
B. Section 66-c of the New York Public Service Law	5
C. Proceedings Below	7
Argument	11
PURPA §210 does not preempt complementary State laws designed to further encourage development of alternative energy facilities	11
Conclusion	20

TABLE OF AUTHORITIES.

Cases.

American Paper Institute, Inc. v. American Electric Power Service Corp., 461 U.S. 402, 103 S. Ct. 1921 (1983) 2,17,18,19

Central Hudson Gas & Elec. Co. v. Public Serv. Comm'n of N.Y., 447 U.S. 557 (1980) 11

Chicago & Northwestern Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1980) 11,16

FERC v. Mississippi, 456 U.S. 742 (1982) 2,13

Jones v. Rath Packing Co., 430 U.S. 519 (1977) 11

Fidelity Federal Savings & Loan Ass'n. v. de la Cuesta, _____ U.S. _____, 102 S.Ct. 3014 (1982) 12,13,14

New York Dept. of Social Services v. Dublino, 413 U.S. 405 (1973) 12,16

Page

Maryland v. Louisiana, 451 U.S. 725 (1980) 11
Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm., ______ U.S. ______, 103 S.Ct. 1713 (1983) . 5,11,12,13,14
Rice v. Santa Fe Elevator Corp., 331 U.S. 218 (1947) 12,13,14,16
Train v. Natural Resources Defense Council, 421 U.S. 60 (1974) 19

Statutes.

PURPA §210, 16 U.S.C. §824a-3 . . . . *passim*
N.Y. Pub. Serv. Law, §66-c . . . . *passim*
N.Y. Energy Law, §3-101, subds 1,5 5

Federal Regulations.

Preamble to FERC Rules, 45 Fed. Reg. 12214-12237 (Feb. 25, 1980) 3,4,15,18
18 C.F.R. Part 292 (1985) 3
18 C.F.R. §292.301 (b) (1985) 18
18 C.F.R. §292.303 (a) (1985) 3
18 C.F.R. §292.303 (b) (1985) 3
18 C.F.R. §292.304 (b)(2) (1985) 3,7,14
18 C.F.R. §292.601 (1985) 4
18 C.F.R. §292.602 (1985) 4

Other Authorities.

State Energy Master Plan, Final Report, Vol. I, pp. 5-10, 29-30 (March, 1982) 5
State Energy Master Plan, Final Report, Vol. II, pp. 15-16, 35, 155, 158 (March, 1982) 5
Governor's Bill Jacket (L1980, ch 553) 5
Governor's Bill Jacket (L1981, ch 843) 5,6,7
Conference Report on PURPA, reprinted in 1978 *U.S. Code Cong. & Ad. News*, 7831 17

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Pursuant to Rule 16 of the Court's Rules, appellee Public Service Commission of the State of New York hereby moves (1) that this appeal be dismissed on the ground that it does not present a substantial federal question or (2) that the judgment of the New York Court of Appeals sought to be appealed from be affirmed.

Statement of the Case

This appeal involves the question whether section 66-c of the New York Public Service Law is preempted by a Federal enactment, PURPA §210. 16 U.S.C. §824a-3. A description of both statutes' legislative histories, their purposes and terms, and the manner in which they have been implemented follows.

A. PURPA §210

As this Court has twice recognized, PURPA §210 was enacted to encourage the development of nontraditional, "alternative" energy supplies. *FERC v. Mississippi*, 456 U.S. 742 at 750 (1982); *American Paper Institute v. American Electric Power Service Corp.*, 103 S.Ct. 1921 at 1924, 1930-1931 (1983). Congress determined that increased use of alternative energy sources would reduce demand for scarce fossil fuels, lessen our dependence on imported supplies of oil, and increase overall efficiency of energy use. See *FERC v. Mississippi*, 456 U.S. at 750, 756.

In enacting PURPA §210, Congress sought to overcome two central problems that had frustrated development of alternative energy sources. First, "traditional" electric utilities were extremely reluctant to purchase power from, and sell power to, alternative power producers. See *FERC v. Mississippi*, 456 U.S. at 750. Second, the utility-like regulation of alternative energy producers by Federal and State authorities imposed financial and administrative burdens upon these entities and thus impeded their development. *Id.* at 750-751.

To redress the first problem Congress charged the Federal Energy Regulatory Commission ("FERC") with prescribing "such rules as it determines necessary to

encourage cogeneration and small power production," including rules requiring electric utilities to offer to purchase power from and sell power to, qualifying alternative energy facilities. PURPA §210(a). Congress directed FERC to promulgate rules governing rates for purchases of electricity by utilities from such qualifying facilities under the Federal program and stated that FERC's rules may not establish rates which exceed the particular utility's "incremental" or "avoided" costs.[1] PURPA §210(b).

To eliminate the second barrier to the development of alternative energy facilities (the burden of Federal and State regulation), Congress directed FERC to prescribe rules exempting qualifying facilities from Federal and State regulation as public utilities. PURPA §210(e). FERC was to promulgate these rules if it found "such exemption is necessary to encourage cogeneration and small power production." *Id.*

Following extensive rulemaking proceedings, FERC issued regulations construing and implementing the Federal statute. See 45 Fed. Reg. 12214-12237 (Feb. 25, 1980), codified at 18 C.F.R. Part 292. The regulations require utilities to offer to purchase electricity from, and sell electricity to, qualifying alternative energy facilities. 18 C.F.R. §292.303 (a), (b). Concerning the rates for purchases to be paid to such facilities under the Federal program, FERC determined that such rates should be equal to each utility's avoided cost. 18 C.F.R. §292.304 (b)(2). In recognition of the fact that several States had also enacted legislation designed to encourage development of alternative energy facilities within their

[1] As used here, a utility's "incremental" or "avoided" costs are the costs the company avoids by purchasing electricity from the alternative energy producer rather than having to either generate the power itself or purchase it from another source. See PURPA §210(d).

States, FERC addressed the operation of these State programs in the context of the Federal enactment, PURPA §210:

> The Commission has become aware that several States have enacted legislation requiring electric utilities in that State to purchase the electrical output of facilities which may be qualifying facilities under the Commission's rules at rates which may differ from the rates required under the Commission's rules implementing section 210 of PURPA.
>
> The Commission has set the rate for purchases at a level which it believes appropriate to encourage cogeneration and small power production, as required by section 210 of PURPA. While the rules prescribed under section 210 of PURPA are subject to the statutory parameters, the States are free, under their authority, to enact laws or regulations providing for rates which would result in even greater encouragement of these technologies. However, State laws or regulations which would provide rates lower than the federal standards would fail to provide the requisite encouragement to these technologies, and must yield to federal law. (*Preamble to FERC Rules*, 45 Fed. Reg. 12214 at 12221 [Feb. 25, 1980]; see also *Id.* at p. 12231).

Acting on the direction of Congress to exempt qualifying facilities from regulation as public utilities if it found "such exemption is necessary to encourage cogeneration and small power production" (PURPA §210[e][1]), FERC issued regulations which exempted such facilities from Federal rate regulation under the Federal Power Act. 18 C.F.R. §292.601. FERC also exempted these alternative energy producers from utility-like regulation under State laws. 18 C.F.R. §292.602.

B. Section 66-c of the New York Public Service Law

Section 66-c of the New York Public Service Law was enacted shortly after the issuance of FERC's regulations. Like PURPA §210, it was designed to encourage development of alternative energy supplies. See N.Y. Pub. Serv. Law, §66-c, subd 1 ["It is hereby declared to be the policy of this state that it is in the public interest to encourage the development of alternate energy production facilities, cogeneration facilities and small hydro facilities. . . ."].

The legislative history behind section 66-c is similar to that of PURPA §210. It reflects a legislative determination that development of alternative energy sources would reduce New York's excessive dependence on petroleum fuels, increase overall efficiency of energy use, and achieve a more diverse (and hence more secure) mix of electric generation supply. *Governor's Bill Jacket* (L1980, ch 553; L1981, ch 843).

The aggressive development of indigenous, alternative energy sources and the reduction of the use of oil for the generation of electricity are major policy goals of New York State. N.Y. Energy Law, §3-101, subds. 1, 5; *State Energy Master Plan*, Final Report, Vol. I, pp. 5-10, 29-30 (March, 1982). That New York, like its sister States, has a substantial governmental interest in the sources and mix of energy supply within the State is unquestioned. See *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Comm.*, _____ US _____, 103 S. Ct. 1713 at 1723 (1983). Indeed, New York's interests in this regard are particularly compelling. Its consumption of oil for the production of electric power ranks among the highest in the country. See *State Energy Master Plan*, Final Report, Vol. II, pp. 15-16, 35, 155, 158 (March, 1982).

While the provisions of section 66-c generally "track" those of PURPA §210, the State statute requires New York's utilities to offer to purchase electricity from facilities qualifying under the State law[2] at a rate of no less than 6¢ per kilowatthour. As the Legislature intended, this 6¢ minimum rate has served to encourage development of alternative energy facilities in New York in several ways. It has enhanced the bargaining position of potential alternative energy developers in their dealings with utilities by providing a guaranteed, baseline purchase rate. It has also acted to expedite the negotiating process between the parties by preventing protracted wrangling over a utility's calculation of its avoided costs. Perhaps most importantly, the 6¢ minimum rate has constituted a firm and identifiable price at which a developer's power will be purchased. This circumstance has enabled developers to obtain long-term financing needed to proceed with alternative energy projects by reducing the perceived "risk" of such projects in the eyes of the financial community.

Prior to the enactment of section 66-c, it was recognized that the 6¢ minimum rate would, at certain times and to varying degrees, exceed the avoided costs of some of the State's utilities.[3] See *Governor's Bill Jacket* (L1981, ch 843), Memorandum of Paul L. Gioia, Chairman, N.Y.S. Public Service Commission;

[2] Virtually all facilities that "qualify" under section 66-c also "qualify" under PURPA §210. See Juris. Statement, p. 6; 4a.

[3] Each utility's avoided cost varies by time of day and season due to such factors as voltage levels, generation mix, fuel sources, and the production facilities utilized. In the case of Consolidated Edison, rates reflecting its avoided costs range from approximately 10¢ to 13¢ per kilowatthour during peak hours (*i.e.*, weekdays) and from 4.7¢ to 5.2¢ per kilowatthour during off peak hours (*i.e.*, weeknights and weekends).

Memorandum of Stanley Klimberg, General Counsel, N.Y.S. Energy Office, p. 2: Budget Report on Bills, p. 7. It was thus evident that, at least in the short-term, the utilities were to be required to purchase power from alternative energy facilities at a cost which at times would be higher than the utilities' current production costs.[4] New York made the judgment, however, that the certainty provided by the 6¢ rate would lead to more rapid development of alternative sources of energy and that the many benefits to be obtained by the State from such development outweighed the minute impact of the 6¢ rate on New York ratepayers' electric bills. Of course, in enacting section 66-c, New York officials were aware of FERC's recent ruling that State programs such as New York's 6¢ provision were consistent with PURPA §210 and not preempted by it. See *Governor's Bill Jacket* (L1981, ch 843).

C. Proceedings Below

The New York Public Service Commission proceeded to conduct hearings designed to implement FERC's regulations (as required by PURPA §210[f]) and the State program (as required by section 66-c [subd 1]). Following extensive proceedings, the Commission issued its Opinion No. 82-10 on May 12, 1982. 29a-161a.[5]

In accordance with FERC's regulations (18 C.F.R. §292.304 [b][2]), the Commission directed utilities to offer facilities qualifying under PURPA §210 a purchase rate

[4] There is no claim that section 66-c requires Consolidated Edison to incur expenses which are not recoverable in rates. New York's utilities are allowed to recover their "purchased power" expenses, as well as other legitimate operating expenses, through the rates they charge their customers. See 92a.

[5] References to ____a are to the Appellant's Appendix to its Jurisdictional Statement.

of no less than avoided cost. 84a-93a. Where a facility qualified under both PURPA §210 and section 66-c (which is usually the case), the Commission required the utilities to offer to purchase power from such facility at the higher of the avoided cost rate or the 6¢ rate. 84a-93a.

Consolidated Edison thereafter sought judicial review of the Commission's determination on several grounds and the matter was transferred to the Appellate Division, Third Department. Concerning the issue *sub judice*, the company argued that the 6¢ provision of section 66-c was preempted by PURPA §210 insofar as it required it to offer Federal qualifying facilities purchase rates which, at certain off-peak times, were in excess of its avoided costs. The Appellate Division accepted this argument and invalidated the 6¢ provision of section 66-c. 16a-26a; reported at 98 AD2d 377, 471 NYS2d 684.

The Commission appealed the decision to the New York Court of Appeals on the ground that the lower court had seriously misapplied the doctrine of Federal preemption. We pointed out that nothing in the language of PURPA §210, or its legislative history, suggested that Congress wished to prohibit the States from providing greater rate encouragement to alternative energy facilities.[6] We also argued, *inter alia*, that the Federal scheme to encourage alternative energy sources was a "limited one" and not so pervasive as to bar complementary State programs such as section 66-c; that section 66-c acted to fulfill the clear "purposes and objectives" of Congress of encouraging development of alternative energy; and that the Federal agency charged

[6] PURPA §210(b) provides only that *FERC's* rules may not establish purchase rates in excess of avoided costs under the *Federal* program.

with implementing PURPA §210 had expressly ruled that State programs such as New York's were consistent with the statute and not preempted by it.

The Court of Appeals unanimously reversed the lower court's ruling on the issue *sub judice* and found that section 66-c was not preempted by PURPA §210. 1a-15a; reported at 63 NY2d 424 (1984). Based on an extensive analysis of the two statutory schemes, their legislative histories, and the manner in which they have interacted, the court held:

> [T]here is no direct conflict between PURPA's maximum purchase rate and the [New York] Public Service Law's higher minimum purchase rate. The language of PURPA and its legislative history indicate that the PURPA avoided-cost rate is only the maximum in the context of the *Federal* government's role in encouraging alternate power production [citations omitted]***
>
> Moreover, FERC determined that independent, complimentary [*sic*] State regulation in the field was not supplanted by PURPA but could be used to expand the Federal PURPA-based incentives. As the administrative agency charged by Congress with implementation of PURPA (see 16 U.S.C. §824a-3 [a], [h]), FERC's interpretation should ordinarily be deferred to [citations omitted]***
>
> Neither does adherance to the [New York] Public Service Law thwart the objectives of PURPA. The purposes of both the State and Federal statutes are identical; they seek to encourage the development of alternate energy production [citation omitted]. The State statute does not hinder the Federal objective, it furthers it, by enhancing the bargaining position of the alternate energy developer through a predictable, guaranteed rate of 6¢ per kilowatthour***

> [W]hile it is recognized that ratesavings may not be achieved for consumers under section 66-c*** because the 6 cents per kilowatthour rate may at times exceed current avoided costs, at least in the short run, the rate does nevertheless further PURPA's objective because it encourages alternate energy production, and in a manner suited to the needs of this State. (8a-11a).

Consolidated Edison thereafter filed the instant appeal with this Court. For the reasons set forth *infra*, the appeal should be dismissed for lack of a substantial Federal question or, in the alternative, the judgment of the New York Court of Appeals affirmed.

ARGUMENT

PURPA §210 does not preempt complementary State laws designed to further encourage development of alternative energy facilities.

It is well-settled that a finding of Federal preemption of State law is not favored and that judicial analysis under the Supremacy Clause starts with "the basic assumption that Congress did not intend to displace State law." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1980); *Chicago & Northwestern Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1980). The clearest indication that Congress sought to preempt the States from acting in a field is from express statutory language to that effect. See *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977). In this case, there is no claim that PURPA §210 expressly bars the States from providing greater rate encouragement to alternative energy facilities through the legislative or regulatory means available to them. The statute addresses only the level of rate encouragement to be required under FERC's rules implementing the Federal program. See PURPA §210(b).

In our view, the lack of express preemptive language in either PURPA §210 itself or its legislative history weighs heavily against Consolidated Edison's preemption argument. After all, Congress clearly recognized the States' substantial interest and involvement in development of alternative generating facilities within their boundaries (see *Pacific Gas & Electric Co., supra*, 103 S. Ct. at 1723; *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557, 571 ["We accept without reservation the argument that ***development of alternative energy sources is an imperative national goal. Administrative bodies empowered to regulate electric utilities have the

authority—and indeed the duty—to take appropriate action to further this goal."]. Indeed, Congress left to the States primary responsibility for administering and enforcing the Federal program to encourage these technologies. Had Congress wished to prohibit the States from further encouraging alternative energy development, it would have so indicated in express statutory language. See *New York Dept. of Social Services v. Dublino,* 413 U.S. 405, 414 (1973).

In the absence of express statutory language, a Congressional desire to prohibit the States from acting will sometimes be inferred if "the scheme of federal regulation [is] so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it" or because "the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject" or because "the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal" an intent to exclusively occupy the field. *Pac. Gas & Elec. Co. v. St. Energy Resources Co.,* _____ US _____, 103 S. Ct. 1713, 1722 (1983); *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta,* _____ U.S. _____, 102 S. Ct. 3014; 3022 (1982); *Rice v. Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947).

Application of these factors to the instant case leads to the conclusion that no "implied" Congressional intent to preempt the States is present. Specifically, it cannot reasonably be argued that the Federal program to encourage alternative energy sources is "so pervasive that Congress intended to leave no room for the States to supplement it." *Id.* This Court's review of PURPA §210 led it to conclude that it constituted a "limited federal regulation***of the relationships between cogenerators and electric utilities." *FERC v. Mississippi,* 456 U.S. 742, 758. This "limited" Federal presence in the field is also evidenced by the preeminent role of the States in implementing, enforcing, and administering the program. PURPA §210(a), (e), (f). Indeed, the Congressional debates on PURPA §210 and the rest of the PURPA legislation reflect a Congressional awareness of the States' substantial interest in alternative energy development within their boundaries and a concomitant desire by Congress to restrict its presence in the field. See, *e.g.,* 124 Cong. Rec. 34558 (remarks of Senator Jackson, "The essential feature of the conference agreement is the limited nature of the authority granted to the FERC").

The same analysis applies with equal effect concerning the question whether the "federal interest" or "object sought to be obtained by the federal law" is "so dominant that enforcement of state laws on the same subject" will be found to be precluded. *Pac. Gas & Elec. Co. v. St. Energy Resources Co., supra; Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, supra; Rice v. Santa Fe Elevator Corp., supra.* Congress clearly recognized that the object sought to be obtained by the federal law—*i.e.*, the development of alternative energy sources—would require extensive State involvement and action to achieve. Indeed, as noted, it left primary responsibility for accomplishment of this Congressional goal with State regulatory officials. See PURPA §210(a), (e), (f). While the "federal interest" in achieving development of alternative energy was clearly an important one, there simply is nothing in PURPA §210, or its legislative history, which suggests that Congress wished to bar the States from furthering this goal through the legislative or regulatory devices available to them.

The final circumstances where a Federal enactment will be found to preempt State law is where the two schemes operate in "actual conflict" rendering "compliance with both federal and state regulations***a physical impossibility" or where the "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Pac. Gas & Elec. Co. v. St. Energy Resources Co., supra; Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, supra; Rice v. Santa Fe Elevator Corp., supra.* It is on these grounds that Consolidated Edison's challenge to section 66-c primarily rests. The company first contends that section 66-c is in "direct conflict" with PURPA §210 because it is "impossible" for the New York Public Service Commission to implement both statutory schemes. Juris. Statement, p. 14.

Such argument is devoid of merit. The New York Public Service Commission has "implemented" the Federal and State programs for over four years now and has accomplished the Federal and State objective of encouraging development of alternative energy facilities. Over 175 contracts between alternative energy producers and utilities have been executed under the provisions of *both* PURPA §210 and section 66-c and have been filed with the Commission. Pursuant to the Federal program, a utility is required to offer to purchase power from a qualifying facility at a rate that is "just and reasonable to the electric consumers of the electric utility and in the public interest." PURPA §210(b)(1). The FERC regulations provide that a "rate for purchase satisfies [these criteria] if the rate equals the [utility's] avoided costs." 18 C.F.R. §292.304(b)(2). If the utility is dealing with a facility that also qualifies under the State law, the utility is required to offer that facility the higher of the

avoided cost or 6¢ rate.[7] While the purchase rates under the Federal and State programs are obviously not always identical, both statutes are "complied" with and "implemented" when the utility offers the qualifying facility the higher of the avoided cost or 6¢ rate.

Consolidated Edison's argument that New York's program is in "direct conflict" with PURPA §210 would be credible if section 66-c compelled utilities to offer qualifying facilities purchase rates *less* than avoided costs. In that situation, compliance with both schemes would be an "impossibility" inasmuch as the State's requirement would frustrate the Federal purpose of encouraging alternative energy by permitting New York's utilities to offer to purchase at rates below avoided costs. The company's argument concerning a "conflict" between the Federal and State statutes might also be credible if Congress had intended PURPA §210 to occupy the entire field of alternative energy development to the absolute exclusion of the States. There is, however, no support for this proposition in either the language of the statute or its extensive legislative history.[8] Similarly, there is nothing in the statute or its legislative history which indicates that Congress wished to prohibit the States from further encouraging alternative energy development through the legislative or regulatory means available to them.

[7] If the 6¢ rate is lower than the particular utility's avoided cost, the Federal and State programs require that the avoided cost rate be offered. *Preamble to FERC Rules.* 45 Fed Reg. at 12221 [Feb. 25, 1980]; see also 93a, footnote 78.

[8] Considering the widely varying need and potential for development of alternative energy sources among the different States, as well as the very localized nature of these technologies, it would have made little sense for Congress to exclusively occupy the field. Had Congress intended to take such a step, it is reasonable to conclude that it would have so indicated in express statutory language.

Consolidated Edison's other line of argument is also lacking in merit. It contends that New York's 6¢ purchase rate, to the extent it exceeds a utility's avoided cost, conflicts with the "purpose and objective" of PURPA §210 of avoiding "ratepayer subsidies" of alternative energy facilities.[9] See Juris. Statement, pp. 16-20. Based on this assertion, the company argues that a finding of Federal preemption is mandated. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (Does "the state policy *** produce a result inconsistent with the objective of the federal statute"); *Chicago & Northwestern Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 316 (Does the "challenged statute stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"). The company's argument assumes the very point in contention in this case; *i.e.*, that Congress intended PURPA §210 to be the exclusive enactment in the field and that any complementary State activity was to be prohibited. As detailed above, there is no indication that this was the case. See *New York Dept. of Social Services v. Dublino*, 413 U.S. 405 at 415 ("The subjects of modern ***regulatory legislation often by their very nature

[9] When a utility purchases power from an alternative energy facility at a price above its avoided cost, it does, by definition, pay more for that power than its own cost of production. The amount paid over avoided cost is referred to by Consolidated Edison as a "ratepayer subsidy" of alternative energy producers because the utility recovers its "purchased power" expenses (as well as other operating expenses) through the rates it charges its ratepayers.

The term "ratepayer subsidy," as used by Consolidated Edison, is a misnomer. It fails to take into account the benefits that ultimately accrue to utility ratepayers from increased use of alternative energy sources such as a reduced need for utilities to construct large, expensive generating plants, increased system security due to a decrease in the utilities' excessive dependence on imported supplies of oil, and the fact that alternative energy facilities have relatively "benign" environmental impacts.

require intricate and complex responses from the Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem").

More fundamentally, Consolidated Edison's argument is grounded on the premise that the "purpose and objective" of PURPA §210 was to avoid "ratepayer subsidies."[10] This premise is, quite simply, erroneous. The "basic purpose" of PURPA §210—a remedial enactment—was to encourage development of alternative energy supplies. *American Paper Institute Inc. v. American Electric Power Service Corp.*, 461 U.S. 402, 103 S.Ct. 1921 at 1930 (1983).[11] While Congress may not have been willing to require utility ratepayers to "subsidize" such development and therefore provided for an avoided cost limit *under the Federal program*, it does not follow that Congress wished to prevent the States from providing greater encouragement to these

[10] As support for this proposition, the company cites two excerpts from the Conference Report on PURPA and a statement by Senator Percy during early Senate subcommittee consideration of PURPA legislation. See Juris. Statement, pp. 16-17. These statements, by their very terms, apply only to the nature of the *Federal* program to encourage alternative energy, not to the operation of complementary State programs. See 1978 *U.S. Code, Cong. & Ad. News* at p. 7831 ("[PURPA §210(b)] deals with the requirements that the Congress places on the *Federal Energy Regulatory Commission* in prescribing rules under [PURPA §210(a)]; *id.* at p. 7832 ("This [avoided cost] limitation on the rates which may be required in purchasing from a cogenerator or small power producer is meant to act as an upper limit on the price at which utilities can be required *under this section* to purchase electric energy") (emphasis added).

[11] In arguing that Congress wished to preempt State programs such as New York's section 66-c, Consolidated Edison relies heavily on this Court's discussion of FERC's "full avoided cost rule" in *American Paper, supra*, 103 S. Ct. at pp. 1927-1930. Clearly, such discussion is directed at the scope of the Federal program to encourage alternative energy development.

technologies through supplemental State programs. Indeed, it is more reasonable to conclude that Congress had no interest in preventing a State from further encouraging alternative energy development, in accordance with that State's particular energy needs, especially where any "rate impact" of such action would be borne by that State's ratepayers.[12]

Consolidated Edison's attempt to transform the avoided cost limitation of PURPA §210 into the central purpose of the statute should be rejected on other grounds as well. Its argument is inconsistent with the *fact* that alternative energy facilities and utilities are free to (and do) negotiate purchase contracts without regard to the avoided cost rule of PURPA §210.[13] See *Preamble to FERC Rules,* 45 Fed. Reg. 12214 at 12217 (Feb. 25, 1980); 18 C.F.R. §292.301(b); see also *American Paper, supra,* 103 S.Ct. at 1930.

Moreover, Consolidated Edison's interpretation of the purpose of PURPA §210 (and its argument that section 66-c, "frustrates" accomplishment of such "purpose") is contrary to the interpretation of the Federal agency charged with implementing the statute, FERC. See *Preamble to FERC Rules,* 45 Fed. Reg. 12214 at 12221 (Feb. 25, 1980). FERC expressly determined that State efforts to further encourage development of alternative energy sources were *consistent* with the "purposes and

[12] The "impact" of the 6¢ rate on New York's ratepayers' electric bills is an extremely minute one. Indeed, at the present time, qualifying alternative energy facilities account for less than 1% of the State's peak load requirement. Further, the "impact" of the 6¢ rate will lessen over time as the utilities' avoided costs increase as forecasted.

[13] This part of FERC's rules has not been challenged by any party.

objectives" of Congress and *not* preempted by PURPA §210. *Id.* This "contemporaneous construction" of the statute, by the Federal agency Congress "charged with the responsibility of setting its machinery in motion," is entitled to substantial judicial deference (*American Paper, supra,* 103 S. Ct. at 1933), particularly in circumstances where, as here, the States and affected parties have relied on such interpretation. See *Train v. Natural Resources Defense Council,* 421 U.S. 60, 87 (1974). In light of PURPA §210's structure and its fundamental purpose of encouraging development of alternative energy sources, FERC's conclusion that the States could foster a greater encouragement of these technologies, under complementary State programs, is clearly a reasonable one and should thus be affirmed. *American Paper, supra,* 103 S.Ct. at 1933 ("We need not find that [FERC's] construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings *** we need only conclude that it is *a* reasonable interpretation of the relevant provisions").

Conclusion

Consolidated Edison's contention that PURPA §210 preempts section 66-c of the New York Public Service Law does not require plenary review by the Court. The company's argument is inconsistent with the language of PURPA §210, its legislative history and purpose, and the interpretation given the statute by the Federal agency charged with implementing it. As to the substantiality of the Federal question here, the facts are that section 66-c was enacted in response to particular State energy needs and it has no impact or application outside New York State. Given these circumstances, the company's appeal should be dismissed or the unanimous judgment of the New York Court of Appeals affirmed.

Respectfully submitted,

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